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No. 111

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

FRANCES G. LEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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FRANCES G. LEE,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

Introduction.

On October 14, 1935, the petition for a writ of certiorari in the above entitled cause was granted and the case was assigned for argument on October 22, 1935. The brief of the petitioner has not yet been received by counsel for the respondent, but counsel has been advised by the Attorney General that the brief to be filed on behalf of the Commis-

sioner in this case will adopt the argument contained in the Commissioner's brief in the case of *Nancy K. McFeely* v. *Guy T. Helvering, Commissioner of Internal Revenue*, now pending in this Court as No. 24. Reference will therefore be made in this brief to the "Statement" and the "Specification of Errors to be Urged" set forth in the petition for a writ of certiorari filed in this case. Reference will also be made in the Argument to the Brief for the Respondent in said case of *Nancy K. McFeely* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

Opinions Below.

The opinion of the Board of Tax Appeals (R., 16-18) is not reported. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 76 F. (2d) 203.

Jurisdiction.

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered March 9, 1935. (R., 27.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The question presented in this case is whether stocks received by the taxpayer on October 6, 1927, as a portion of the residue of the estate of George B. Glessner, who died on September 4, 1926, a resident of the State of New Hampshire, which were thereafter sold by the taxpayer during the year 1929 were "Capital Assets," as defined in Section 101 of the Revenue Act of 1928.

Statement.

The statement of the case appearing at pages 2, 3 and 4 of the petition for a writ of certiorari correctly sets forth the facts involved in this case.

Summary of Argument.

The Circuit Court of Appeals for the First Circuit correctly determined that the stock of International Harvester Company and Commonwealth Edison Company received by the taxpayer under the provisions of the Will of George B. Glessner, who died on September 4, 1926, which were sold by her in 1929 were "Capital Assets" and correctly determined that the gain from the sale of said stocks was a "Capital Gain," all as defined in Section 101 of the Revenue Act of 1928.

I.

The taxpayer acquired the stocks here in question upon the death of Mr. Glessner in 1926 and held these stocks from that date until the date of their sale in 1929.

A. The date upon which the taxpayer acquired and became vested with the ownership of the stocks here in question is to be determined by the laws of New Hampshire.

Poe v. *Seaborn*, 282 U. S. 101, 110.
De Vaughn v. *Hutchinson*, 165 U. S. 566, 570.

B. The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that under the laws of New Hampshire, the title to the residue of the estate of Mr. Glessner vested immediately upon his death in the residuary legatees named in his will and as one of those legatees, her title and interest in the stocks here in question became vested at that time.

Walker v. *Hill*, 73 N. H. 254; 60 Atl. 1017, 1019.
Carter v. *Whitcomb*, 74 N. H. 482, 69 Atl. 779, 781.
Sanborn v. *Clough*, 64 N. H. 315, 10 Atl. 678.

II.

The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that the stocks here in question, were "held" by her from the date of the death of Mr. Glessner in 1926, which was more than two years prior to the date of their sale, and these stocks were, therefore, "Capital Assets," as defined in Section 101 (c)(8) of the Revenue Act of 1928.

A. The word "held" as used in Section 101 (c)(8) of the Revenue Act of 1928 means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by that taxpayer.

1. It is a well settled and often reiterated rule that words used in the Revenue Act should be given their usual and ordinary meaning.

Old Colony R. R. v. *Commissioner*, 284 U. S. 552, 560.

B. The period during which property is "held" by a taxpayer commences with the date on which the ownership in the property is acquired by the taxpayer.

Dunigan v. *Burnet*, 66 F. (2d) 201, 202.

Hooper v. *Commissioner*, 26 B. T. A. 758, 760.

Shaffer v. *Commissioner*, 28 B. T. A. 1294, 1309.

Helvering v. *New York Trust Company*, 292 U. S. 455, 469.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

C. In interpreting the provisions of the Revenue Acts, the Supreme Court has held that the date of the acquisition by a residuary beneficiary of her interest in the estate of a decedent is the date of the death of the decedent even in those states where contrary to the rule in New Hampshire it is held that title to the personal property vests in the executor named in the will of the decedent.

Brewster v. *Gage*, 280 U. S. 327, 333.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

III.

The Commissioner erroneously contends that under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the stocks here in question were not "held" by the taxpayer until they came into her physical possession.

A. The Commissioner has held, with reference to the similar Capital Gain Section of the Revenue Act of 1921, that the period of holding by a residuary beneficiary of personal property commences with the date of acquisition, which has been held to be the date of death.

Income Tax Ruling 1889, III-1 C. B. 70.

B. The rulings of the Commissioner interpreting the Capital Gain Section of the Revenue Act of 1921 must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, in the Revenue Acts of 1924, 1926 and 1928.

Brewster v. *Gage*, 280 U. S. 327, 337.

U. S. v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466.

Massachusetts Mutual Life Insurance Co., v. *U. S.*, 288 U. S. 269, 273.

Helvering v. *Bliss*, 293 U. S. 144, 151.

C. Neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of Section 101 (c)(8) of the Revenue Act of 1928.

Income Tax Ruling 1889, III-1 C. B. 70.
Helvering v. *New York Trust Co.*, 292 U. S. 455.
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Schwinn v. *Commissioner*, 9 B. T. A. 1304.
Income Tax Ruling 2466, VII-1 C. B. 95.
Bradbury v. *Commissioner*, 353-A-C. C. H. 10107.

IV.

The Commissioner erroneously contends that Sections 101(c)(8) and 113(a)(5) of the Revenue Act of 1928 must be read together and that it was the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution.

A. Section 101(c)(8) of the Revenue Act of 1928 does not adopt or incorporate in its provisions any part of Section 113(a)(5) of that Act. Said Section 113(a)(5) does not purport to limit, control or modify the provisions of said Section 101(c)(8).

B. In enacting Section 113(a)(5) of the Revenue Act of 1928 which effected a change in the law as to the "basis date" for determining gain or loss from the sale of property transmitted at death, Congress did not intend thereby to modify or change the interpretation of the provisions of Section

101(c)(8) which was not changed by the Revenue Act of 1928.

U. S. v. Flores, 289 U. S. 137, 149.
Gulf States Steel Co. v. *U. S.*, 287 U. S. 32, 45.
U. S. Cartridge Co. v. *U. S.*, 284 U. S. 511, 516.

1. The legislative history of Section 113(a)(5) of the Revenue Act of 1928 shows clearly that Congress did not intend by that enactment to modify or change the interpretation of the provisions of Section 101(c)(8) of that Act.

2. That Congress recognized that Section 113(a)(5) of the Revenue Act of 1928 did not modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 and recognized that said Section 113(a)(5) provided one date for the "basis date for valuation" and recognized that said Section 101(c)(8) provided for a different date for the commencing of the period during which personal property is "held" by a residuary legatee, is clearly evidenced by the change made in the provisions of the "Basis for Determining Gain or Loss" Section of the Revenue Act of 1934.

3. It cannot be held that Congress intended that Section 113(a)(5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 because in those instances where Congress desired that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section, specific provision was made with reference thereto in the "Capital Gain" section.

First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

V.

The Commissioner erroneously contends that, "It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin."

Shaffer v. *Commissioner*, 28 B. T. A. 1294.

VI.

The case of Helvering v. New York Trust Co. was erroneously relied upon by the Circuit Courts of Appeal in the cases of Rand v. Helvering and Ogle v. Helvering and is erroneously cited by the Commissioner as authority controlling the decision of this case.

Helvering v. *New York Trust Co.*, 292 U. S. 455.
Helvering v. *Bliss*, 293 U. S. 144.
First National Bank of Boston v. *United States*, 76 F. (2d) 200, 202.

VII.

The principles of law announced in Crooks v. Harrelson and in like cases should be controlling in this Lee case.

Crooks v. *Harrelson*, 282 U. S. 55.

ARGUMENT.

The Circuit Court of Appeals for the First Circuit correctly determined that the stock of International Harvester Company and Commonwealth Edison Company received by the taxpayer under the provisions of the Will of George B. Glessner, who died on September 4, 1926, which were sold by her in 1929 were "Capital Assets" and correctly determined that the gain from the sale of said stocks was a "Capital Gain," all as defined in Section 101 of the Revenue Act of 1928.

I.

The taxpayer acquired the stocks here in question upon the death of Mr. Glessner in 1926 and held these stocks from that date until the date of their sale in 1929.

A. The date upon which the taxpayer acquired and became vested with the ownership of the stocks here in question is to be determined by the laws of New Hampshire.

George B. Glessner was a resident of the State of New Hampshire at the date of his death and his will was admitted to probate in the State of New Hampshire (Trans., p. 10). The taxpayer is a resident of New Hampshire and the nature of the right, title and interest which she obtained under the will of this decedent must be determined in the absence of an express provision to the contrary in the Revenue Act in accordance with the laws of New Hampshire, as in any determination involving the vesting of titles, properties or interests therein, the Federal courts

follow and are controlled by the law of the State in which such question arises.

In the case of *Poe* v. *Seaborn*, 282 U. S. 101, the question certified to the Court for decision was whether Mr. Seaborn was required to include in his taxable income among other items the entire amount of the profits on the sale of real estate standing in the name of Mr. Seaborn alone or whether only one-half thereof was taxable to him because of the Community Property Law. Mr. and Mrs. Seaborn were residents of the State of Washington and their respective interest in this real estate was determined by the Community Property Law of Washington. The Court said at page 110:

> "The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property. What, then, is the law of Washington as to the ownership of community property and of community income, including the earnings of the husband's and wife's labor?
>
> The answer is found in the statutes of the State, and the decisions interpreting them."

See also:

De Vaughn v. *Hutchinson*, 165 U. S. 566, 570.

B. The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that under the laws of New Hampshire, the title to the residue of the estate of Mr. Glessner vested immediately upon his death in the residuary legatees named in his will and as one of those legatees, her title and interest in the stocks here in question became vested at that time.

This is clearly shown by the case of *Walker* v. *Hill*, (Supreme Court of New Hampshire, May 2, 1905), 73 N. H. 254; 60 Atl. 1017. This was a bill for the construction of

the will of Gustavus Walker. Under the provisions of this will, the decedent gave to his wife all of his household furniture and furnishings and one-half of the remainder of his estate, real, personal and mixed, and the income from the remaining one-half of the estate during her lifetime.

The lower court requested instructions from the Supreme Court and among these questions were (p. 1018): "(4) When did her title as legatee and devisee vest?" The Court said at page 1019:

> "* * * The title to all the real estate and that part of the personal property not needed for the payment of such charges vested in her on his death, one-half in fee and the other for life, for that is the time when his will became operative."

In the case of *Carter* v. *Whitcomb* (Supreme Court of New Hampshire, April 7, 1908), 74 N. H. 482, 69 Atl. 779, the Court said at page 781:

> "The testatrix's will became effective to pass property upon her death. The necessary delays incident to the settlement of the estate and final decree of distribution did not postpone the passing of the estate within the meaning of the statute. The legatees derived their title from the testatrix. Their rights became fixed at her death. They then became the owners of the property bequeathed to them, though the possession and actual enjoyment thereof were delayed by operation of law, * * *"

See also, *Sanborn* v. *Clough*, (Supreme Court of New Hampshire, July 15, 1887) 64 N. H. 315, 10 Atl. 678.

That the taxpayer acquired her title and interest in the stocks here in question at the date of the death of Mr. Glessner is further shown by the fact that after the death of Mr. Glessner, any increase or decrease in the value of these stocks, increased or decreased the value of the estate of the taxpayer; she had the right to transfer or assign

her interest in these stocks at any time; these stocks would have been a portion of her estate had she died; these stocks were subject to the claims of her creditors; she was entitled to the benefit of the dividends that were thereafter declared thereon; she had all the benefits of complete and absolute ownership therein from the date of the death of Mr. Glessner to the date upon which she sold said stocks; her interest in and title to these stocks did not originate in, upon or by the decree of distribution.

This contention of the taxpayer was not controverted by the Commissioner in the proceedings before the Circuit Court of Appeals and was approved by that Court. The respondent, therefore, assumes that in these proceedings the petitioner will concede that under the laws of New Hampshire, the taxpayer acquired her title and interest in the stocks here in question in 1926, upon the death of Mr. Glessner.

II.

The taxpayer here contends, as she contended in the proceedings before the Circuit Court of Appeals, that the stocks here in question, were "held" by her from the date of the death of Mr. Glessner in 1926, which was more than two years prior to the date of their sale, and these stocks were, therefore, "capital assets," as defined in Section 101 (c) (8) of the Revenue Act of 1928.

Section 101(*c*) (8) of the Revenue Act of 1928 is as follows:

> "'Capital Assets' means property held by the taxpayer for more than two years. * * *"

The meaning or definition of the word "held" should therefore determine the issues in this case.

A. The word "held" as used in Section 101(c)(8) of the Revenue Act of 1928 means "owned" or "having title to" and property "owned" by a taxpayer is property "held" by that taxpayer.

1. It is a well settled and often reiterated rule that words used in the Revenue Act should be given their usual and ordinary meaning.

In the case of *Old Colony R. R.* v. *Commissioner*, 284 U. S. 552, in considering the meaning of the phrase, "all interest paid * * * on its indebtedness," which appears in the definition of the net income of a corporation in the Revenue Act of 1921, Mr. Justice Roberts, speaking for the Court, said at p. 560:

> "Is this the reasonable construction of the language of the act,—'all interest * * * on its indebtedness'? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy's Lessee* v. *McCartee*, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence*, 16 How. 251, 261. And see *United States* v. *Buffalo Gas Co.*, 172 U. S. 399, 341; *United States* v. *First Nat. Bank*, 234 U. S. 245, 258; *Caminetti* v. *United States*, 242 U. S. 470, 485. As was said in *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts: *DeGanay* v. *Lederer*, 250 U. S. 376, 381."

The usual and ordinary meaning of the word "held" is indicated in the definitions of "hold" appearing in standard dictionaries.

In New English Dictionary, Oxford Edition, "hold" is defined as "to own, have as property, to be the owner."

In Webster's New International Dictionary, "hold" is defined as "to own." In The Century Dictionary and Cyclopedia, "hold" is defined as "to own." In Funk and Wagnall's New Standard Dictionary, "hold" is defined as "keep as one's own, or simply to own or control."

The usual and ordinary meaning of the word "own" used so frequently in the definitions of the word "hold" is indicated in the following definitions thereof appearing in standard dictionaries: In Webster's New International Dictionary, "own" is defined as "to have or hold as property; to have rightful title to, whether legal or natural." In The Century Dictionary and Cyclopedia, "own" is defined as "to have and enjoy the right of property in." In Funk and Wagnall's New Standard Dictionary, "own" is defined as "to have the legal or rightful title to."

From the definitions of the words "held" and "owned" referred to above, it must be conceded that if the taxpayer is the "owner" of the property in question, then that property is "held" by the taxpayer. The usual and ordinary meaning of the word "owner" is indicated in the following definitions thereof appearing in standard dictionaries. In New English Dictionary, Oxford Edition, "owner" is defined as "one who owns or holds something as his own (though he may not be in possession)"; in The Century Dictionary and Cyclopedia, "owner" is defined as "one who has the legal or rightful title, whether he is the possessor or not;" in Webster's New International Dictionary, "owner" is defined as "one who has the legal or rightful title, whether the possessor or not."

B. The period during which property is "held" by a taxpayer commences with the date on which the ownership in the property is acquired by the taxpayer.

1. The usual and ordinary meaning of the word "acquired" is indicated in the following definitions thereof appearing in standard dictionaries. In The Century Dictionary and Cyclopedia, "acquire" is defined as "to get or gain, the object being something which is more or less permanent, or which becomes vested or inherent in the subject;" in Webster's New International Dictionary, "acquire" is defined as "to get as one's own; as to acquire a title;" in Funk and Wagnall's New Standard Dictionary, "acquire" is defined as "get as one's own."

In the following cases the courts and the Board of Tax Appeals have sustained the contention of the Commissioner and have determined that the period during which property is "held", as defined in Capital Gain Sections of the Revenue Acts, commences with the date of the acquisition of that property.

In the case of *Dunigan* v. *Burnet*, 66 F. (2d) 201, (C. A. D. C. June 5, 1933) the Court in discussing the definition of "Capital Assets" appearing in the Revenue Act of 1921, said at page 202:

> "In the sale of stocks, bonds or land bought for investment as an entirety, the applicability of the provisions of the statute depends solely on the question of the time of *acquisition*." (Italics supplied.)

In the case of *Hooper* v. *Commissioner*, 26 B. T. A. 758, the Board determined that a taxpayer who had acquired property on October 10, 1925, and sold the same at a profit on October 10, 1927, had not held the property for more than two years and said at page 760:

> "In order for the petitioner to get the relief here

sought, she must have held the property for more than two years from the time she *acquired* it * * *." (Italics supplied.)

In the case of *Shaffer* v. *Commissioner*, 28 B. T. A. 1294, the Board said at page 1309:

"The two-year period mentioned in Section 208(*a*) (8) begins to run from the date of petitioners *acquisition* of the property and not from the date of payment therefor or the date when additional costs in respect thereof were incurred." (Italics supplied.)

2. Section 206(*a*)(6) of the Revenue Act of 1921, by defining "Capital Assets" as those assets "*acquired* and held" for more than two years, expressly provided that the "holding period" began at the date of acquisition, and the taxpayer contends that no change in the law was made by the omission of the word "acquired" in the definition of "Capital Assets" in the Revenue Acts of 1924, 1926 and 1928. The following authorities and considerations support this contention:

(a) In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at page 469, Mr. Justice Butler, in commenting upon the "Capital Assets" Section, said: "In view of the inclusion of the *same* definition in the case of 1921, 1924 and 1926, and the legislative purpose underlying it, the contention that the new words were added to change the meaning of 'capital assets' as defined in the earlier acts is without force."

(b) No suggestion that the law was intended to be changed by the omission appears in the Reports of the Congressional Committees. H. R. 179, 68th Cong., 1st Sess., pages 19 and 20, S. R. 398, 68th Cong., 1st Sess., pages 21 and 22.

(c) As stated in the *First National Bank of Boston* v. *United States*, 76 F. (2d) 200, at page 202, the obvious reason for the omission was that the word "acquired" was regarded as surplus.

C. In interpreting the provisions of the Revenue Acts, the Supreme Court has held that the date of the acquisition by a residuary beneficiary of her interest in the estate of a decedent is the date of the death of the decedent even in those states where contrary to the rule in New Hampshire it is held that title to the personal property vests in the executor named in the will of the decedent.

In the case of *Brewster* v. *Gage*, 280 U. S. 327, it appeared that Brewster, Sr., died testate on May 20, 1918, a resident of Rochester, New York. Pursuant to a final decree of the Surrogate's Court entered on April 19, 1920, stocks were distributed to Brewster, Jr., one of the residuary legatees. He sold some of these stocks in 1920, 1921 and 1922 and in his income tax returns he computed profit or loss on each sale by comparing the selling price of the stock with its value at the date of the decree of distribution. The Commissioner of Internal Revenue held that the values of the stock at the date of the testator's death should be taken for the calculation of income and on that basis assessed for each year additional tax, which Brewster, Jr., paid under protest and thereafter brought an action to recover the amount so paid under protest. The District Court gave judgment for Brewster which was reversed by the Circuit Court of Appeals, and the judgment of the Circuit Court of Appeals was affirmed by the Supreme Court. Mr. Justice Butler rendered the opinion of the court and said at page 333:

> "It is necessary to construe the word 'acquired' and the phrase 'at the time of such acquisition' to determine whether the value of the stock at the time of testator's death or its value on the date of the decree should be used in the calculation.
>
> Upon the death of the owner, title to his real estate passes to his heirs or devisees. A different rule applies to personal property. Title to it does not vest at once

in heirs or legatees. *United States* v. *Jones*, 236 U. S. 106, 112. But immediately upon the death of the owner there vests in each of them the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution. *Sanders* v. *Soutter*, 136 N. Y. 97. *Vail* v. *Vail*, 49 Conn. 52. *Cook* v. *McDowell*, 52 N. J. Eq. 351. Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. *Foster* v. *Fifield*, 20 Pick. 67, 70. *Wager* v. *Wager*, 89 N. Y. 161, 166. *Thompson* v. *Thomas*, 30 Miss. 152,158.

Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. And, notwithstanding the postponement of transfer of the legal title to him, Congress unquestionably had power and reasonably might fix value at the time title passed from the decedent as the basis for determining gain or loss upon sale of the right or of the property before or after the decree of distribution. And we think that in substance it would not be inconsistent with the rules of law governing the descent and distribution of real and personal property of decedents to construe the words in question to mean the date of death."

In the case of *Brewster* v. *Gage*, the Court was construing the word "acquired" appearing in Section 202 of the Revenue Act of 1921 but in the construction of that word it was necessary for the Court to determine the date on which the interest of a residuary legatee vests and the Court

found that that date was the date of the death of the testator. The taxpayer contends that the rule of law in the case of *Brewster* v. *Gage*, is controlling in this case. It must be conceded here that Mrs. Lee acquired her interest in the stocks in question on September 4, 1926, the date of the death of Mr. Glessner.

The Commissioner erroneously argues (McFeely Brief, 24-27) that Sec. 113(a) (5) of the Revenue Act of 1928 provides that a residuary legatee acquires his legacy at the time of distribution and that therefore the rule of *Brewster* v. *Gage*, 280 U. S. 327, that the time of acquisition in the case of a residuary bequest is the time of the death of the testator, was changed. The simple answer to this contention is that no such provision appears in this section, which is as follows:

> "Section 113(*a*). Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— * * * (5) * * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

Obviously this section does not define the date of acquisition of a residuary bequest. Its purpose and effect as stated in *Brewster* v. *Gage*, 280 U. S. 327, 337, was to change the date on which the basis for determining gain or loss is fixed, in the case of a residuary bequest, from the date of acquisition to the time of distribution of the estate; it does not change the rule that the time of acquisition, in the case of a residuary bequest, is the time of the testator's death.

Mr. Justice Wilson, in the decision in *First National Bank of Boston* v. *United States*, 76 F. (2d) 200, (C. C. A. 1st, 1935) found support for the Court's conclusion that the

legacy there in question was acquired at the date of the death of the testator in the very words of Sec. 113(*a*) (5). He said at page 202:

> "It is significant, however, that even in paragraph (a) (5) of section 113 of the 1928 Revenue Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, 'If personal property was acquired by specific bequest,' etc., and 'in all other cases if the property was *acquired either by will or by intestacy.*' (Italics supplied.)"

III.

The Commissioner erroneously contends that under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, the stocks here in question were not "held" by the taxpayer until they came into her physical possession.

From the stipulated facts it appeared that the stocks here in question were delivered to the taxpayer by the Executor of the estate of Mr. Glessner on October 6, 1927 (R., 14) and the Commissioner therefore contends "that the two year holding period of a general or residuary legatee should begin at the date of distribution." (McFeely Brief, page 28.) The taxpayer submits that this contention of the Commissioner should not be sustained for the following reasons:

A. The Commissioner has held, with reference to the similar Capital Gain Section of the Revenue Act of 1921, that the period of holding by a residuary beneficiary of personal property commences with the date of acquisition, which has been held to be the date of death.

In a letter from the Commissioner to Prentice-Hall, Inc. (Prentice-Hall Tax Service for 1923, pages 2703-4), the

Commissioner stated with regard to Section 206(a) (6) of the Revenue Act of 1921 defining "capital assets":

> "* * * Where property owned by the decedent at the time of his death is distributed to the beneficiaries of his estate, such property will be treated as having been acquired and held by the beneficiaries from the date of the decedent's death for the purpose of Section 206."

In Income Tax Ruling 1889 III-1 C. B. 70, the Commissioner has stated that under the definition of "Capital Assets" appearing in Section 206 (*a*) (6) of the Revenue Act of 1921, which is similar to the provisions of Section 101(*c*) (8) of the Revenue Act of 1928 here in question, the two-year period during which assets must be held in the case of property received under the terms of a will, commences with the date of the testator's death. This ruling was promulgated prior to June, 1924, and the pertinent portions thereof are as follows:

> "Advice is requested in regard to the Federal income tax liability arising from the sale by the taxpayer in 1922 of certain securities which he received in 1921 as part of his distributable share of the estate of his father, who died in 1919.
>
> The particular question raised is whether the two-year period during which capital assets must be held to entitle the taxpayer to the benefit of the provisions of section 206 of the Revenue Act of 1921 ran from the date of the testator's death or from the later date on which the beneficiary actually received possession of the securities.
>
> The question requires a determination of the meaning of that part of section 206 (*a*) (6) which provides:
>
> 'The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years * * *'
>
> It is well settled that the interest of a distributee of a decedent's estate attaches upon the date of the de-

cedent's death. Mr. Justice Holmes thus states the rule in *Hooper* v. *Bradford*, (1901) (178 Mass, 95, 97):

> 'The time when the property passes under a deed is not later than the death of the grantor. The same is true in the case of a will. It is true that in the later instance the interest of a legatee is subject to an account, but still it is an interest in the fund as it is, analogous to that of a *cestui que trust*, and vests at the death of the testator.'

To the same effect is *Mechanics' Savings Bank* v. *White*, (1889) (150 Mass., 234). • • •

In an article in 21 Harvard Law Review, 436, the result of the authorities is thus summarized:

> • • • 'Neither an executor nor an administrator takes any beneficial interest in the decedent's property. And on the death of the testator or intestate, both legatees and next of kin get an immediate interest in the personal estate analogous to that of a *cestui que trust*.'

The Department has adopted this doctrine in regulations and rulings, holding that a distributee of property from a decedent's estate acquires it at the date of the decedent's death for the purpose of determining gain or loss from its sale by such distributee. (Art. 1563, Reg. 62; L. O. 1012, C. B. 2, 34.)

Granted, then, that a distributee acquires an immediate interest in the decedent's estate at the date of the decedent's death, and that this interest is analogous to that of a *cestui que trust*, is this interest 'property acquired and held by the taxpayer' from the time of the death? In other words, does the quoted phrase embrace simply legal interests in possession, or does it further embrace the beneficial interest of a distributee, which later is converted into a legal interest by the actual distribution?

That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (*c*) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. The subdivision provides:

> 'In the case of a partnership or of an estate or

trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (*b*) of this section.'

These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (*c*) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned. Since the section should be construed so as to give effect to both provisions, rather than merely one (*Monroe Co.* v. *Riordan* (1922), 280 Fed., 624, 626), it appears that Congress did not intend the words 'property acquired and held by the taxpayer' to refer exclusively to legal property interests; but that beneficial interests in property are also included. Moreover, according to the doctrine of the cases quoted *supra*, a distributee of a decedent's estate has an interest vesting at the decedent's death analogous to that of a *cestui que trust;* section 206 (c) expressly grants to a *cestui* the privilege of determining his tax in the manner provided by that section; accordingly, the distributee should be accorded a like privilege. * * *"

These rulings of the Commissioner are still in effect as they have never been amended or revoked.

B. The rulings of the Commissioner interpreting the Capital Gain Section of the Revenue Act of 1921 must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, in the Revenue Acts of 1924, 1926 and 1928.

That the ruling of the Commissioner promulgated in 1924 in Income Tax Ruling 1889 quoted above must be deemed to have received legislative approval by the re-enactment of the provisions of the law referred to in the ruling, is clearly indicated in the following cases:

In the case of *Brewster* v. *Gage*, 280 U. S. 327, the Court said at page 337:

> "The substantial re-enactment in later Acts of the provision theretofore construed by the Department is persuasive evidence of legislative aproval of the regulation."

In the case of *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, the Court said at page 466:

> "The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provision without material change."

In the case of *Massachusetts Mutual Life Insurance Co.* v. *U. S.*, 288 U. S. 269, the Court said at page 273;

> "The Congress in the Revenue Acts of 1928 and 1932 re-enacted § 245 without alteration. This action was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute. * * *."

See also the case *Helvering* v. *Bliss*, 293 U. S. 144, 151, in which the rulings of the Commissioner which the Court

held had been approved by the re-enactment of the law, were a telegram, an Income Tax Ruling set forth in the Internal Revenue Bulletin, and a mimeographed instruction to Collectors.

C. Neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

In each of the following situations it has been held or the Commissioner has ruled that neither physical possession nor legal title to the property in question for two years is required in order that the property may be considered as "held" under the provisions of said Section 101 (*c*) (8).

(1) The beneficiary of an estate or trust having neither physical possession nor legal title to the property held by the Trustee which is sold, is given the privilege of computing his tax under the provisions of Section 101, by reason of the provisions of Section 168 of the Revenue Act. The inconsistency of the present contention of the Commissioner with his former rulings is particularly apparent at this point in the argument. In Income Tax Ruling 1889 III—1 C. B. 70, previously referred to, the Commissioner said:

> "That Congress did not intend to require legal title and possession by the use of the terms 'acquired and held' in defining capital assets is strongly indicated by subdivision (c) of section 206, stating the method for the application of the section to cases of partnerships, estates, or trusts. • • •
>
> These provisions give the beneficiary of an estate or trust the privilege of computing his tax under section 206, although the estate or trust and not the beneficiary had legal title to and possession of the capital assets sold. If the phrase 'property acquired and held

by the taxpayer' in the definition of capital assets requires legal title and possession in him, it is obvious that subdivision (*c*) could not be given effect, so far as a beneficiary of an estate or trust in the designated cases is concerned."

(2) A donee who has had physical possession and legal title to property for less than two years may treat the gain arising upon the sale of the property as "capital gain" if the combined period of holding by the donor and donee exceeds two years.

Helvering v. *New York Trust Co.*, 292 U. S. 455.

(3) When stock is declared as a stock dividend and is immediately thereafter sold, the stock so received is considered as "held" for more than two years if the stock upon which the dividend was declared has been held for more than two years. Clearly the date of the distribution and delivery of the stock dividend is not considered as the date on which the holding commences. In Regulations 74 relating to the income tax under the Revenue Act of 1928, the following appears as a part of Article 501:

"If the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets."

(4) If rights to subscribe to stock are declared and immediately sold, such rights are considered as held for more than two years by the holder of the original shares if the holder of the original shares has held the original shares for more than two years. Clearly the date of the distribution and delivery of the stock rights is not considered as the date on which the holding commences. In a memorandum of the General Counsel of the Bureau of Internal Revenue G. C. M. 11645, XII-1 C. B. 117, the General Counsel of the Bureau of Internal Revenue has stated:

"Where the stock rights are sold, it is the opinion

of this office that in determining the period for which the taxpayer has held the property, there should be included the period for which he held the stock with respect to which the rights were issued. • • • The regulations have provided from the beginning that if the taxpayer has held for more than two years stock upon which a stock dividend has been declared, both the original and the dividend shares are considered to be capital assets, and it is the opinion of this office that the same treatment must be accorded to the sale of stock rights which are analogous thereto."

See also *Insull* v. *Commissioner*, 32 B. T. A. No. 161.

(5) In the following cases it has been held by the Board of Tax Appeals and the Circuit Courts of Appeal that property is "held" by a taxpayer within the meaning of the Capital Gain Section of the Revenue Act if the taxpayer has an equitable title therein even though the legal title to the property is vested in a trustee and not in the taxpayer.

Hay v. *Commissioner*, 25 B. T. A. 96,
Phipps v. *Commissioner*, 54 F. (2d) 469 (C. C. A. 2, December 7, 1931).

(6) When stock is purchased on margin, the stock is not issued in the name of the purchaser nor is it delivered to the purchaser until the debit balance has been paid but neither the date on which the transfer of the certificate is made on the books of the company nor the date on which the certificate is delivered to the purchaser is material. If the purchaser purchased the stock more than two years prior to the date of its sale, it is considered that he has "held" that stock from the date of the purchase and is entitled to return the profit, if any, as a "capital net gain." Income Tax Ruling 1818, II-2 C. B. 39.

In the case of *Schwinn* v. *Commissioner*, 9 B. T. A. 1304, the Commissioner treated stock purchased on margin, the

certificates for which were never issued in the name of the purchaser or delivered to the purchaser, as, nevertheless, "held" by the purchaser from the date of purchase.

(7) Where the owner for more than two years of a membership in a stock exchange which increased its membership and issued to each old member a one-quarter interest in a new membership, sold his interest in the new membership immediately upon the receipt thereof, he was held by the Commissioner of Internal Revenue to be entitled to treat the gain upon the sale of the new membership as a capital gain, although the distribution and delivery of the new membership was within two years from the date of the sale thereof. Income Tax ruling 2466 VIII-1 C. B. 95.

(8) In the case of *Bradbury* v. *Commissioner*, 353-A, C. C. H. 10107, the Circuit Court of Appeals for the Sixth Circuit held that stock acquired by the taxpayer under the provisions of an agreement, although never delivered, received or held by the taxpayer, which was sold more than two years after the execution of the agreement was "held" by the taxpayer and the profit realized upon the sale thereof was taxable as a "capital net gain".

(9) The Commissioner will no doubt concede that the owner of a remainder interest in real estate which is subject to a life estate does not have physical possession of that real estate, but nevertheless if he sells it after owning it for more than two years this real estate will be considered as "held" by him under the provisions of Section 101 (c)(8).

(10) The Commissioner will no doubt concede that one who purchases real estate subject however to a long term lease does not have physical possession of that real estate, but nevertheless if he sells it more than two years after

he purchased it, this real estate will be considered as "held" by him under the provisions of Section 101 (c)(8).

(11) The Commissioner will no doubt concede that had Mr. Glessner made a specific bequest to the taxpayer of the stocks here in question and had that stock been transferred and delivered to her, as here, in 1928 and sold by her, as here, in 1929, she would not have had physical possession of these stocks for more than two years and yet they would be considered as "held" by her for more than two years under the provisions of said Section 101(c)(8).

The contention of the Commissioner that under the provisions of said Section 101(c)(8) property is not "held" by a residuary legatee until physical possession thereof is obtained introduces differences in the definition of the word "held" appearing in the various Revenue Acts for which there is no basis whatsoever. It must be conceded that the word "held" where used in similar sections of the Revenue Acts of 1921, 1924, 1926 and 1932 does not connote physical possession nor does it in the Revenue Act of 1928 when referring to property acquired by a specific legatee.

From the foregoing it must appear that delivery and distribution of the property in question to the owner thereof has never been determinative of the time when the property was first "held" by the owner thereof. Neither physical possession nor legal title has ever been considered an essential element in the definition of the word "held" as used in the Capital Gain Section of the Revenue Acts. The time when ownership commences is the time that the period of holding commences. Legal title is not necessary, a vested, indefeasible, equitable ownership is sufficient. Upon the death of Mr. Glessner, the taxpayer acquired her right of ownership in the residue of his estate, all the benefits of ownership therein were acquired by her as of that

date and it must therefore be determined that her portion of the residue of that estate was "held" by her from the date of the death of Mr. Glessner to the date on which she disposed of the same, which was for a period of more than two years.

IV.

The Commissioner erroneously contends that Sections 101(c)(8) and 113(a)(5) of the Revenue Act of 1928 must be read together and that it was the intention of Congress that the two-year holding period of a general or residuary legatee should begin at the date of distribution.

This contention of the Commissioner is set forth at pages 14 to 28 of the McFeely brief and was approved by the Circuit Courts of Appeal in the cases which are to be argued with this case, *i. e., Rand* v. *Helvering,* No. 439, *Ogle* v. *Helvering,* No. 137 and *Dibblee* v. *Commissioner,* No. 494.

There was included in the Revenue Act of 1921 under the title "Basis for Determining Gain or Loss" the following:

> "Section 202(*a*). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that— * * *
>
> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. * * *"

This was re-enacted in substantially the same language in the Revenue Act of 1924 as Section 204(*a*)(5) and in the Revenue Act of 1926 as Section 204(*a*)(5).

A substantial change in the section of the law providing for the basis for determining gain or loss was made in the Revenue Act of 1928. The pertinent provisions of the Revenue Act of 1928 are as follows:

> "Section 113(a). Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— * * * (5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

From the foregoing, it should be noted that under the Revenue Acts of 1921, 1924 and 1926, the basis for determining the gain or loss upon the sale of personal property acquired by a residuary beneficiary was the fair market value of such property at the time of such acquisition which the case of *Brewster* v. *Gage*, 280 U. S. 327, determined to be the date of death of the testator. By the Revenue Act of 1928, the basis for determining the gain or loss upon the sale of personal property acquired by a residuary beneficiary was changed to the fair market value of the property at the time of the distribution to the taxpayer.

A. Section 101(c)(8) of the Revenue Act of 1928 does not adopt or incorporate in its provisions any part of Section 113(a)(5) of that Act. Said Section 113(a)(5) does not purport to limit, control or modify the provisions of said Section 101(c)(8).

Section 101 of the Revenue Act of 1928 deals exclusively with the subject of "Capital Net Gains and Losses." Section 101(*c*)(8) determines and specifies the period during which property however acquired must be held if the profit thereon when sold is to be taxable at 12½%. This is accomplished by defining "capital assets" as property held, which means owned, by the taxpayer for more than two years and by stating that the profit upon the sale of capital assets may be taxable at 12½%.

Section 113 of the Revenue Act of 1928 deals exclusively with the entirely separate and distinct subject of the "Basis for Determining Gain or Loss." Section 113(*a*)(5) fixes as the basis for determining the gain or loss from the sale or other disposition of personal property acquired after February 28, 1913, by a residuary legatee, the fair market value of the property at the time of the distribution to the taxpayer. There is no provision of Section 113(*a*)(5) which purports to direct the time of the acquisition of ownership or the beginning of the holding or owning of personal property by a residuary legatee.

There is nothing in said Section 101(*a*)(8) which can be construed as incorporating therein the provisions of said Section 113(*a*)(5) or from which it can be implied or inferred that the "basis date for valuation" fixed by said Section 113(*a*)(5) is adopted or incorporated in said Section 101(*c*)(8) as the date from which the two-year holding period shall run. The two sections cover absolutely separate and distinct subjects which are entirely independent and unrelated to one another.

Under the provisions of Section 113(*a*)(5) the taxpayer must first compute the gain resulting from the sale of personal property acquired by him as a residuary legatee and having thus ascertained the amount of the gain he must then determine, pursuant to the provisions of Section 101(*c*)(8), whether or not the property has been "held" by him for more than two years after the date of its acquisition, namely, the date of the death of the testator. If it is then determined that the property has been held by him for more than two years from the date of the death of the testator, the property can then be considered by him as "capital assets" under the provisions of Section 101(*c*)(8) and the amount of gain, computed upon the basis prescribed under Section 113(*a*)(5), at his option, may be returned as "capital net gain" instead of as "ordinary net income."

Each section is used for a separate and distinct purpose. Section 113(*a*)(5) is used to determine the amount of the taxable gain. Section 101(*c*)(8) is used to ascertain whether the amount of gain upon the sale of property acquired by a residuary legatee may be taxable as "capital net gain" rather than "ordinary net income."

B. In enacting Section 113(a)(5) of the Revenue Act of 1928 which effected a change in the law as to the "basis date" for determining gain or loss from the sale of property transmitted at death, Congress did not intend thereby to modify or change the interpretation of the provisions of Section 101(c)(8) which was not changed by the Revenue Act of 1928.

The legislative history of a law enacted by Congress should be considered in construing that law, and the law should be construed to carry out the legislative intent.

U. S. v. *Flores*, 289 U. S. 137, 149.

Gulf States Steel Co. v. *U. S.*, 287 U. S. 32, 45.

The reports of the legislative committees should be considered in construing a law as those reports are indicative of the intent of Congress in enacting the law.

U. S. Cartridge Co. v. *U. S.*, 284 U. S. 511, 516.

1. The legislative history of Section 113(a)(5) of the Revenue Act of 1928 shows clearly that Congress did not intend by that enactment to modify or change the interpretation of the provisions of Section 101(c)(8) of that Act.

The Commissioner at page 16 of the McFeely brief erroneously contends that "Congress, in establishing the date of distribution for valuation as the basis for determining the gain * * *, certainly intended that the same date should measure the period such property was held by the taxpayer * * *."

The legislative history of the enactment of Section 113(*a*)(5) of the Revenue Act of 1928 and the reports of the various committees of Congress with reference to the changes made by that section clearly shows that Congress did not intend thereby to modify or in any manner change the interpretation of the provisions of Section 101(*c*)(8) of that Act.

The first sentence of Section 113(*a*)(5) of H. R. 1, 70th Cong., 1st sess., as originally introduced, was as follows:

> "If the property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent."

The first sentence of the section quoted above is identical with Section 204(*a*)(5) of the 1926 Act, except for the insertion of the words "or by a decedent's estate" and for the substitution at the end of the sentence of the words "at the time of the death of the decedent" for the words "at such time of such acquisition." This change was rec-

ommended to Congress by the Joint Committee on Internal Revenue Taxation in order "to make the basis certain and definite" and avoid the doubt as to what is meant by the date of acquisition. (See Report of Joint Committee, Vol. 1, pp. 17, 74, 75). The Ways and Means Committee Report No. 2, p. 18, 70th Cong., 1st sess., indicates that it accepted the Joint Committee's recommendation in the following language:

> "In view of the decision of the Court of Claims in *McKinney* v. *United States*, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death and this rule is incorporated in Sec. 113(*a*)(5).
>
> It is also provided in the same paragraph that the basis in the case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.
>
> Under existing law the basis in such a case is the value at the date of 'acquisition', which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determined basis."

The bill as passed by the House was then sent to the Senate and referred to the Finance Committee on December 17, 1927, and that committee on May 1, 1928 (*Senate Finance* Committee Report No. 960, 70th Cong., 1st sess.) reported the bill out with certain amendments. The Committee Report, with reference to Sec. 113 (p. 28), reads as follows:

> "The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in Sec. 113(*a*)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides

the same basis shall be used where the property is sold by the beneficiary. It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the Committee has revised Sec. 113(*a*) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty, or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

As submitted to the Senate by the Finance Committee, with its accompanying report, the section under discussion appears as follows, the portions in italics being the section as originally passed by the House, and the remaining portion representing the section as amended by the Senate:

"(5) PROPERTY TRANSMITTED AT DEATH.—*If the*

property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (c) or (e) of the Revenue Act of 1921, or in section 392 (c) or (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to transfers in contemplation of or intended to take effect at or after death and to property passing under power of appointment.) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer;"

The foregoing amendment by the Senate, numbered 75, and the amended bill as passed by the Senate, was sent to the Committee on Conference, which on May 25, 1928, reported it to the House of Representatives (Conference Report No. 1882, H. R., 70th Cong., 1st sess.) with the following recommendation, (p. 3):

"Amendment numbered 75. That the House recede from its disagreement to the amendment of the Senate numbered 75 and agree to the same with an amendment as follows:

On page 14 of the Senate engrossed amendments, at the end of line 14, insert a period and the following:

In the case of property transferred in trust to pay the income for life to or upon order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property

after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

And the Senate agree to the same."

Sec. 113(a) (5) of the Revenue Act of 1928 was finally adopted with the amendment agreed to in the Conference Committee.

At no stage in this legislation is there evident any intent of Congress to effect any modification in the intepretation of the provisions of Section 101(*c*) (8) of the Revenue Act of 1928 by the changes made in Section 113(*a*) (5). The language used in Section 113(*a*) (5) and the legislative history of the enactment of that portion of the law shows conclusively that its adoption in no manner affected or qualified or was intended to affect or qualify said Section 101(*c*) (8) and shows that the "basis date for valuation" in determining gain or loss on the sale of personal property acquired by a residuary beneficiary under the provisions of Section 113(*a*) (5) is in no way related to but on the contrary is entirely independent of, distinct from and in contrast to the date of acquisition of the property by the residuary legatee.

2. That Congress recognized that Section 113(a)(5) of the Revenue Act of 1928 did not modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 and recognized that said Section 113(a)(5) provided one date for the "basis date for valuation" and recognized that said Section 101(c)(8) provided for a different date for the commencing of the period during which personal property is "held" by a residuary legatee, is clearly evidenced by the change made in the provisions of the "Basis for Determining Gain or Loss" Section of the Revenue Act of 1934.

By Section 113(*a*) (5) of the Revenue Act of 1934 the "basis" for personal property acquired by a residuary bene-

ficiary was changed from the value at the date of distribution as provided in the Revenue Act of 1928 to the value at the time of acquisition. The provisions of Section 113(*a*) (5) of the Revenue Act of 1934 are as follows:

> "(5) Property transmitted at death.—If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, *the basis shall be the fair market value of such property at the time of such acquisition.* * * *" (Italics supplied.)

It should be noted that the portion of the Section of the Act in italics is identical with the similar portion of the "Basis" Section of the Revenue Acts of 1921, 1924, and 1926.

The Committee on Ways and Means, in its report (Committee on Ways and Means Report 704, 73rd Cong., 2nd sess., p. 27) stated with respect to the change made in Section 113(*a*) (5):

> "Under section 113 (*a*) (5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death, is, in the following cases, the fair market value thereof at the time of the death of the decedent:
>
> (1) Where personal property was acquired by specific bequest;
>
> (2) Where real property was acquired by general or specific devise, or by intestacy;
>
> (3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.
>
> In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.
>
> Included within the phrase 'all other cases' is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property on a

sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

Section 113(*a*) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 Act. The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage,* 280 U. S. 327.) Section 113 (*a*) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

From the foregoing it must be perfectly apparent that Congress recognized that Section 113(*a*) (5) or the Revenue Act of 1928 did not modify or change the interpretation of Section 101(*c*) (8) of the Revenue Act of 1928, and recognized that said Section 113(*a*) (5) provided one date for the "Basis Date for Valuation" and recognized that said Section 101(*c*) (8) provided for a different date for the

commencing of the period during which personal property is "held" by a residuary legatee.

3. It cannot be held that Congress intended that Section 113(a)(5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(c)(8) of the Revenue Act of 1928 because in those instances where Congress desired that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section, specific provision was made with reference thereto in the "Capital Gain" section.

The pertinent provisions of Section 101(*c*) (8) (A), (B) and (C) of the Revenue Act of 1928 are as follows:

> "(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purpose of this definition—
>
> (A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.
>
> (B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.
>
> (C) In determining the period for which the taxpayer has held stock or securities received upon a dis-

tribution where no gain is recognized to the distributee under the provisions of section 112 (*g*) of this title or under the provisions of section 203 (*c*) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

This was a re-enactment of substantially the same language appearing in the Revenue Act of 1926 which introduced for the first time into the law the provisions now appearing in Paragraphs (A), (B) and (C) of Section 101(*c*) (8) set forth above.

Under the Revenue Act of 1924 and the Revenue Acts prior thereto, there were many instances in which the "Basis Date for Valuation" used in determining the amount of gain or loss was not identical with the date used in determining the commencement of the period of holding. Congress in Section 101(*c*) (8) of the Revenue Act of 1926 and in Section 101(*c*) (8), (A), (B) and (C) of the Revenue Act of 1928 intended to permit the taxpayer in certain cases enumerated therein to add to the time of his actual "holding period" the time of other separate and distinct "holding periods." Obviously Paragraphs (A), (B) and (C) of Section 101(*c*) (8) quoted above have no connection with Section 113(*a*) (5).

That Congress did not intend that Section 113(*a*) (5) of the Revenue Act of 1928 should modify or change the interpretation of Section 101(*c*) (8) of the Revenue Act of 1928 is clearly shown upon an examination of the legislative history of Section 101(*c*)(8), (A), (B) and (C). These paragraphs of the law appeared for the first time in the Revenue Act of 1926.

The following appears in the Report of the Committee on Ways and Means accompanying H. R. No. 1, Rept. No. 1,

Union Calendar No. 1, 69th Cong., First sess., page 6, with reference to the proposed change in the "Capital Gain" section of the Revenue Act:

> "The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section."

The Committee on Finance in the Senate, in its report accompanying H. R. No. 1, Rept. No. 52, Calendar No. 54, 69th Cong., 1st sess., incorporated the House Committee's statement.

From the foregoing, it appears that when Congress has intended that the "Capital Gain" Section should be modified by the "Basis for Determining Gain or Loss" Section of the law, it has made specific provision with reference thereto in the "Capital Gain" Section. It must therefore follow that Congress did not intend that Section 113(*a*) (5) of the Revenue Act of 1928 should modify or change the in-

terpretation of Section 101(*c*) (8) of the Revenue Act of 1928 as no specific provision was made in Section 101 of the Revenue Act of 1928 with reference thereto. The enactment of the specific provisions of Paragraphs (A), (B) and (C) of Section 101(*c*) (8) of the Revenue Act of 1928 indicates clearly that where Congress intended that Section 101 was to be modified by Section 113 it expressly provided therefor and indicates clearly that it was the intention of Congress that except where it expressly so stated, the interpretation of Section 101(*c*) (8) was not to be modified or changed by any change made in the provisions of Section 113.

The contention of the Commissioner that Sections 101 and 113 of the Revenue Act of 1928 must be read together was considered by the Circuit Court of Appeals in the case of *The First National Bank of Boston* v. *United States*, 76 F. (2d) 200. Mr. Justice Wilson delivered the opinion of the Court and said at page 202:

> "Sec. 101 and Sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.
>
> In other words, Congress intended only by the change in Sec. 113 (a) (5) of the 1928 Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in Sec. 101 of that Act from the provisions of Sec. 208 (a) (8) of the 1926 Act for determining what are capital assets.
>
> In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts of allowing a gain from the sale of property held

for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing Sec. 113 (a) (5) of the 1928 Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by Sec. 113 (a) (5) of the Act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in Sec. 101 of that Act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see Sec. 208 (a) (8) of the 1926 Act, and see Sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 Act."

The taxpayer submits that this determination by the Circuit Court of Appeals for the First Circuit was correct.

V.

The Commissioner erroneously contends that, "It is not logical to presume that Congress deliberately fixed a date for determining the basis of property wholly without regard for the date when the two-year holding period should begin."

No authority is stated for this proposition that Section 101(c)(8) must be construed as though amended by Section

113(a)(5) of the Revenue Act of 1928 for indeed there is no authority therefor. There is, however, ample authority for the contrary proposition which the taxpayer contends to be the law, that under the Revenue Acts heretofore in effect and now in effect, there are many instances which have been recognized by the Commissioner, the Board of Tax Appeals and the Courts in which the date when the period of holding commences under the "Capital Gain" Section of the law is different from the "Basis Date for Valuation" as fixed by the "Basis for Determining Gain or Loss" Section of the law.

It is submitted that in the majority of cases in which the cost of the property held is the basis for the determining of the gain or loss upon the sale thereof the date on which the cost is fixed will have no relation to the time when actual ownership begins. Cost in many cases will be determined before or after and not always at the same time that ownership begins.

In the case of *Shaffer* v. *Commissioner*, 28 B. T. A. 1294, it appeared that Shaffer acquired stock in the Louisville Herald Company in 1910 at a cost of $239,580 and the value thereof on March 1, 1913 was equal to the cost thereof. In financing the Louisville Herald Company he made expenditures of large sums of money in 1923 and in 1924 which were included in computing the cost of that stock to him. He sold the stock of Louisville Herald Company and sustained a loss in 1924 and sustained further losses in connection with the sale of the property in 1926. Shaffer contended that he was entitled to take the losses as ordinary net losses in the years 1924 and 1926 but the Board held that although the payments made by him on account of this stock in 1924 and 1926 were to be considered in computing the cost of the stock to him, nevertheless as he had acquired title to the stock prior to March 1, 1913, he had therefore

held the stock for more than two years and the loss sustained upon the sale of the stock should be treated as a "Capital net loss." Obviously in this Shaffer case the date of acquisition of the stock by Mr. Shaffer was a date different from the date upon which payments were made by him which were used in determining the cost of the stock to him and it was not held that the law should be construed in such a manner as to make these two dates identical.

In the case of property bought pursuant to the provisions of an option contract the price paid for the property is of course determined as of the market value or the agreed value at the date of the option contract. The date of acquisition of ownership in the property is obviously a later date than when the option is exercised, and yet the Revenue Act cannot be so construed as to make the date for determining the cost, identical with the date of acquisition of the ownership of the property.

In the case of grain purchased for future delivery the "basis date for determining valuation" is obviously the date on which the contract is made and not the date on which the delivery of the grain is made. Delivery of the grain is made at a later date and the Revenue Act has never been construed in such a manner as to make the "basis date for valuation" identical with the date of acquisition of ownership in the grain.

In the case of property acquired before 1913, the Revenue Acts have expressly provided the arbitrary date of March 1, 1913, for determining the basis of value and this is without reference to the date when the holding period begins.

From the foregoing it must therefore appear that there have been and now are many instances in which the date for determining the basis for gain or loss is fixed wholly without regard to the date when the holding period begins,

and the fact that this may be illogical should be immaterial to the Court; the remedy, if it is necessary that Revenue Act be logical, is to be sought in Congressional action.

VI.

The case of Helvering v. New York Trust Co. was erroneously relied upon by the Circuit Courts of Appeal in the cases of Rand v. Helvering and Ogle v. Helvering, and is erroneously cited by the Commissioner as authority controlling the decision of this case.

At pages 17 to 23 of the McFeely Brief the Commissioner contends that the case of *Helvering* v. *New York Trust Co.*, 292 U. S. 455 is controlling in the issues here involved. That case presented the question of whether or not gain arising from the sale of property transferred by gift could be returned by the taxpayer as "Capital Net Gain" under the provisions of the Revenue Act of 1921. The Commissioner contended that in the absence of express language in the 1921 Act permitting the adding of the donee's tenure of ownership of the property to the tenure of ownership of the donor, notwithstanding the fact that the donee was bound by the donor's basis for determining the gain or loss under Section 206 (a) (6) of that Act, the construction of Section 202 (a) (2) required that the period of the donee's holding within the definition of "Capital Assets" commenced to run from the date of the gift. This Court (Justices Roberts, Brandeis and Stone dissenting) held that the taxpayer was entitled to the benefit of the Capital Gain section. Mr. Justice Butler who delivered the opinion of the Court, stated that the amendment of the Capital Gain Section, which was made in 1926 by adding to the definition of "Capital Assets" a sentence to the effect that in determin-

ing the period for which the taxpayer held property, "there shall be included the period for which such property was held by any other person," if under the cost basis section, such property has the same basis for the purpose of determining the amount of gain or loss as it would have had in the hands of such other person, was merely declaratory of the law as it had existed prior to the 1926 Act, and said, in part:

> "No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort."

The taxpayer submits that differences in the facts of the New York Trust Company case and this Lee case make it inapplicable as a controlling precedent in this Lee case; that the underlying policy there announced supports the contention of the taxpayer here; and that there is nothing in the decision that furnishes authority for the contention made by the Commissioner in this Lee case, that since the basis for determining gain or loss to the taxpayer was determined at the date of distribution, the "holding period" should begin at the same time.

In the New York Trust case large profits had accumulated, these profits were measured for income tax purposes by the difference between the basis of the donor, which was the cost of the gift, and the selling price of the donee; and the impelling reason for this decision was admittedly found not in the express language of the "Capital Gain" section but in the purpose of that section to relieve the taxpayer

from excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions.

Before this decision Congress had expressed its intent by enacting the provision in the Revenue Act of 1926 which permitted the addition of the "holding period" of donors and donees for the purposes of the two-year limitation. Therefore, it seems that the decision was merely another manifestation of the general tendency to liberalize the "Capital Gain" section of the Act. See *Helvering* v. *Bliss*, 293 U. S. 144.

In this Lee case, there is only one tenure, that of the taxpayer, and this the Commissioner contends should be curtailed for the sake of logic and consistency. It is one thing for the Court as in the New York Trust case to liberally construe a tax provision which was enacted for the benefit of taxpayers, so as to permit a taxpayer who does not come within its express terms, to have the benefit of it; but it would be quite a different matter for this Court to construe such a tax provision so as to deny the benefit of that provision to a taxpayer who is within the express terms of the exemption. Here, a normal construction of the Revenue Act will give relief to a taxpayer who has realized large gains from the conversion of property actually held for more than two years.

Insofar as the Commissioner finds authority in the New York Trust Co. case for his theory that the "basis" date and the date on which the holding period begins should coincide, he is in error. There, it was not decided that the time during which the donee had held his gift began at the time the basis for determining gain or loss was fixed, but that the tenures of a donor and donee whatever they may be, for the purposes of the "Capital Gain" section, may

be added together, regardless of the time that the basis for determining gain or loss was fixed.

Mr. Justice Wilson, who delivered the decision of the Court in the case of *First National Bank of Boston*, v. *United States*, 76 F. (2d) 200 (C. C. A. 1st, 1935), was correct in saying, at page 203:

> "We find nothing in the decisions in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, or *Helvering* v. *Bliss*, 293 U. S. 144, which modifies the rule laid down by the Supreme Court in *Brewster* v. *Gage*, *supra*, * * *."

VII.

The principles of law announced in Crooks v. Harrelson and in like cases should be controlling in this Lee case.

In the case of *Crooks* v. *Harrelson*, 282 U. S. 55, the Court said at page 60:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority and not with the courts."

and at page 61:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quote with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might

otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The erroneous decisions of the Circuit Courts of Appeal in the Dibblee, Ogle, and Rand cases and of the Board of Tax Appeals in the McFeely case which was affirmed by the Circuit Court of Appeals for the Third Circuit by *per curiam* opinion in which it was held that Section 101(*c*)(8) of the Revenue Act of 1928 must be construed as though amended by Section 113(*a*)(5) of that Act in order that the Revenue Act of 1928 may be "consistent" are clearly flagrant examples of judicial legislation which are contrary to the facts and to the rule of the law announced in the foregoing cases and contrary to the practical effect of the operation of the Revenue Act in the various transactions enumerated above.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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